IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL.

Second Appeal No. 174 of 2001
(Old No. 2980 of 1981)

1. Sri Tek Chandra
   S/o Sri Gokul Chand (Deceased)
   R/o Adityanand Road Rishikesh
   District Dehradun
2. Shiv Kumar Agarwal
   S/o Late Shyam Lal Agarwal
   House No. 03 Adarsh Gram Mandir Road
   Rishikesh, District Dehradun
3. Rakesh Agarwal
   S/o Late Shyam Lal Agarwal
   House No. 03 Adarsh Gram Mandir Road
   Rishikesh, District Dehradun
4. Mukesh Agarwal
   S/o Late Shyam Lal Agarwal
   House No. 03 Adarsh Gram Mandir Road
   Rishikesh, District Dehradun ……Appellants

Vs

1. Pt. Chakra Dhar Bhauguna
   S/o Late Pt. Bal Mukand Bahuguna
   R/o No. 140 Chukkhuwala Dehradun
   Now living at 57 Nahville Road
   Dehraudn
2. Pt. Rewa Dhar Bahuguna
   S/o Pt. Balmukand Bahuguna
   R/o Aditya Nand Marg
   Rishikesh, Dehradun
3. Pt. Shambu Prasad
4. Pt. Dhanjaya Sharma
   S/o Late Pt. Girdhar Bahuguna
   Living in No. 2 Laxman Bhawan
   Hussain Ganj, Lucknow
5. Smt. Shanwati Dabral
   W/o Sri Bansidhar Dabral
   (D/o Late Pt. Girdhar Bahuguna)
   Madhya Pradesh
6. Punjab Singh Kshetra, Rishikesh
   A Society Registered under the
   India Societies Act
   Having its registered office at Rishikesh
   District Dehradun ……Respondents

Sri V.K. Bist, learned Senior Advocate assisted by Sri V.K. Kaporwan, learned counsel for the appellants
Sri Lokendra Dobhal holding brief of Sri Rajendra Dobhal, learned counsel for the respondents.

Hon'ble B.C. Kanadpal, J.

This second appeal has been preferred by the appellants against the judgment and decree dated 21.10.1981 passed by Additional District Judge, Dehradun in Civil Appeal No. 170 of 1977 arising out of judgment and decree dated 19.11.1977 passed by Civil Judge, Dehradun in original Suit No. 68 of 1973.

2. Brief facts giving rise to this appeal are that the plaintiffs/respondents filed a suit against the defendants/appellants for possession and recovery of mesne profits. The allegation of the plaintiffs is that they have ¾ share in joint property detailed in the plaint. The property was attached before judgment in suit No. 204 of 1952 filed by defendant No.2 against defendant No. 3. The plaintiffs No. 1 and 2 and Girdhar Bahuguna, Predecessor in interest of plaintiffs No. 3 to 5, filed objections against the said attachment before the Munsif, Dehradun. The objections were dismissed summarily on technical grounds. The hours was sold in execution of the decree passed in favour of defendant No. 2 and against defendant No. 3 Defendant No.1 purchased this house in auction on 4.05.1965 before the confirmation of sale in the execution proceeding, the plaintiff filed suit No. 304/56 for declaration of their ¾ share in the disputed property. The suit of the plaintiffs was dismissed by the Munsif, Dehradun, They filed appeal against the judgment and order of the Munsif before the Addl. Civil Judge, Dehradun, who allowed the appeal and the plaintiffs suit was decreed and the sale in favour of defendant held on 04.06.1956 was set aside to the extent of ¾ share of the plaintiffs. During the

Pendency of appeal, defnednat No. 1 obtained possession of the disputed property through Advocate Commissioner, appointed by the Munsif, Dehradun. The defendant No.1 also filed appeal against the judgment and order of the Addl. Civil Judge, Dehradun before the Allahabad High Court. The appeal was dismissed by the Allahabad High Court. Therefore the plaintiffs filed suit for possession of 3/4 share in the disputed property; for recovery of Rs. 900/- as mesne profits and Rs. 25/- per month as pendentelite and future mesne profits.

3. The defendant filed W.S. and alleged that the property attached in the suit had different boundaries. The property as described in the plaint was not attached. The legal proceedings instituted between the parties, were admitted by the defendants. It was also alleged that the property cannot yield profit of Rs. 25/- per month. It was also alleged that the plaintiffs moved an application U/S 144 C.P.C. being Misc. Application No. 98 of 1971. The said application was dismissed and the decision has become final between the parties. The suit is not maintainable because the provision of Section 144 C.P.C. is barred by estoppel and acquiescence.

4. The defendant No. 2 filed W.S. and admitted the allegations made in the plaint.

5. On the basis of the pleadings of the parties, learned Civil Judge framed the following issues:-

1. Whether the property alleged in Meerut (?) was attached in suit No. 204 of 1952? if so, its effect?
2. Whether the plaintiff’s are entitled to any damages? If so, at what rate?

3. Whether the suit is barred by principles of resjudicata?
4. Whether the suit is within time?
5. Whether the suit is barred by principles of estoppel and acquiescence?
6. To what relief, if any, is the plaintiff entitled?
7. Whether the suit is barred by Section 144 (2) of the C.P.C. ?

6. Thereafter parties adduced evidence in support of their case.

7. The trial court after perusing the evidence on record and having heard learned counsel for the parties decreed the suit for possession of the plaintiffs of the property in suit to the extent of ¾ ; for recovery of Rs. 900/- on account of past mesne profit and pendentelite and future mesne profits @ Rs. 25/- per month till the date of putting of plaintiffs in joint possession on payment of requisite court fee.

8. Feeling aggrieved, the defendants/appellants filed appeal before the Additional District Judge, Dehradun, who vide impugned judgment and decree dated 21.10.1981 dismissed the appeal.

9. Against the aforesaid judgment and decree the defendants/appellants preferred the second appeal before the Allahbad High Court, which has been transferred to this court, after creation of new State.

10. At the time of admission, this Court admitted the appeal on the following substantial question of law:-

1. Whether the suit of the plaintiff/respondent was barred by Section 144(2) of the C.P.C.?
2. Whether the suit was barred by time?

11. Heard Sri Sri V.K. Bist, learned Senior Advocate assisted by Sri V.K. Kaporwan, learned counsel for the appellants, Sri Lokendra Dobhal holding brief of Sri Rajendra Dobhal, learned counsel for the respondents and perused the record.

12. The record reveals that the facts admitted in this case are that the decree was obtained by the defendant No. 2-Punjab Singh Kshetra, Rishikesh against the defendant-Raghuband Prasad Bahuguna. The property was put to sale in execution and the respondents – Chakra Dhar Bhaguna and Rewa Dhar Bahuguna and Smt. Shyamwati Dabral filed an objection against the attachment, which was dismissed. Thereafter, they filed the suit being No. 340 of 1956 and this suit was decreed in the first appeal. In the meantime, the property was auctioned which was ultimately confirmed and the possession of the property was delivered to Chakra Dhar Bahuguna, the auction purchaser. The law about the restitution has undergone some changes in 1954 and in 1976. Section 144 of C.P.C. as amended it its application to U.P. stood as under at the relevant time:-

"1. Where and In so far as decree or an order is varied or reversed in appeal, revision or otherwise, the court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made, as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed; and, for this purpose, the

Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or reversal.

2. No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).”

13. The aforesaid provision shows when the court has deprived a person of any right or property, it can always restore the property to him under the inherent power vested in it. The powers of restitution are inherent in addition to the provisions of Section 144 C.P.C.

14. However, a suit would be barred by Section 144 (2) C.P.C. only if the right of restitution can be exercised strictly within the terms of Section 144(1) C.P.C., according to the terms that sub section itself. Thus to find whether the present suit would be barred by the provisions of these sub sections, it has to be seen whether the plaintiffs could have brought an application for restitution under Section 144 (1) C.P.C. If they could have sought restitution under the inherent power of the court alone, the bar created by Section 144 (2) C.P.C. would not be attracted and the suit would be maintainable.

15. To obtain restitution under Section 144 C.P.C. there must be decree or an order passed by a court and such decree or order must have been varied or reversed in an appeal, revision or otherwise, a party should have obtained benefit under the order or decree so varied, reversed and another party should be entitled to restitution of such benefit. On behalf of the respondents the applicability of Section 144 has been challenged on the ground firstly that where the

Decree has been set aside in separate proceedings, Section 144 would not be applicable. Secondly, it was urged that a third party who was not a party to the proceedings in which the original order or decree was passed would not be entitled to an application under Section 144 C.P.C. It was also argued that such an application is also not maintainable against a stranger auction purchaser.

16. Section 144 was amended in 1976 to specifically provide for its application where a decree or an order is set aside or modified in any suit instituted for this purpose. The clause however did not appear in per-amended section 144 in the C.P.C. even as it was amended in its application to U.P. by Act 24 of 1954. It was however been held in the case of Vindhyachan Tiwari Vs Board of Revenue & others, A.I.R. 1956 Allahabad 663 that if an order or decree had been varied or reserved in separate suit the provisions of Section 144 would be applicable.

17. The plaintiffs/appellants property had been attached in execution of decree to which they were not parties. They were not parties to the execution proceeding in which the order for attachment was issued. They filed an objection to the attachment on rejection of which they filed a suit in which the attachment was set aside. Neither the objector plaintiffs/appellants nor the auction-purchaser were party to the proceedings at the time when the attachment was ordered and therefore the plaintiff could not have moved an application as a party before the court whose order had been reversed.

18. Still another ground for an application under Section 144 not being maintainable is the fact that the

Appellant against whom the restitution is being enforced is a stranger auction- purchaser. In the case of S.S. Chokalingam Asari Vs N.S. Krishna Iyer & others, A.I.R. 1964, Madras 404 the law in this regard has been discussed in detail. After discussing the various earlier authorities including that of Privy Council, it has been held that an application under section 144 can not be maintained not only against a stranger auction purchaser but also against a bonafide transferee from a decree holder auction purchaser.

19. I, therefore, find that an application under Section 144 C.P.C. would also not be maintainable in the present situation because of the fact that the person against whom restitution was being sought is an auction purchaser not being the decree holder.

20. Because of the above reasons, I find that the application under Section 144 would not be maintainable in this case to get the possession of the property. This suit was the only possible remedy and was therefore, well maintained.

21. As a necessary consequence to this, I find that this suit is also not barred by the principles of resjudicata in as much as the application under Section 144 C.P.C. Which was rejected in default was not maintainable.

22. In order to deal with the second substantial question of law, it will be necessary to have some dated. The property was sold on 04.06.1956. The possession delivered on 04.12.1958. The first appeal allowing the plaintiff claim to property was decided on 28.10.1960. In the second appeal No. 439 of 1961 the defendant obtained a stay. That appeal was dismissed on 26.04.1968. These facts are not disputed.

23. According to the appellant, the plaintiffs became entitled to obtain possession on 28.10.1960 and ought to have moved an application fro restitution within three years, as provided by Article 181 of the Indian Limitation Act 1908. He has relied upon the case of ***Mst. Dhapo Vs Bakridi, A.I.R. 1932, Allahabad 609.*** In that case two propositions have been laid down. Firstly, it has been held that where the decree is reversed in first and second appeal, the period of limitation starts on the day the first appeal is allowed.

24. Secondly, it was held that Article 181 applied to an application for restitution.

25. In the case of ***Mahigi Bhai Mohan Bhai Barot Vs Patel Manibhai Gokal Bhai & others, AIR 1965 Supreme Court, 1477,*** the Hon'ble Apex Court held that the application for restitution is an application for execution and is governed by Article 182 and not 181. The period of limitation is 12 years and not 3 years.

26. Thus the law laid down in the case of Mst. Dhapo about Article 181 being applicable to proceeding under Section 144 has been over ruled by the Supreme Court decision.

27. This suit also seeks to execute the order passed by the court setting aside the attachment and sale of the property, thereby reversing an order passed by a court. This claim is essentially in the nature of restitution though not strictly covered by the provisions of Section 144(1) of the C.P.C. On the same reasoning as has been adopted in the aforesaid case, it can be held that this suit would also be

governed by Article 182 of the Old Limitation Act and Article 136 of the Limitation Act of 1963.

28. Even otherwise a suit for possession of immovable property on the basis of title is governed by Article 65 of the present Act and was governed by 144 of the Old Act In either of the situation the period of limitation was 12 years from the date when the possession of the defendant became adverse to the plaintiff. It the present case, the defendant was holding the property as auction purchaser and acquired the right to sue only when his first appeal was allowed in October, 1960. It was on that date that the defendants' possession became adverse to the plaintiff as before that date the plaintiff did not have any right to sue for possession.

29. It was also argued on behalf of the appellants that at the best the suit could be governed by Article 120 of 1908 Act and the period of limitation would be 6 year. The current Act reduced this period of 3 years only.

30. In view of the fact that the suit for possession of immovable property is covered by specifi9c Article namely 144, Article 120 would have no application. Even if this suit is governed by Article 120, on the date of the application of the New Act, the period had not expired and accordingly under Section 30 of the Limitation Act of 1963, the suit could be initiated within 5 years of the coming enforce of this Act or within the period prescribed for this suit under the old Act whichever period expired earlier.

31. The entire right to claim possession under this suit was based upon the judgment passed in the first appeal being appeal No. 3 of 1960. But for that decision the present suit

could not be maintained. It is alleged in para 9 of the plaint and admitted in the written statement that the defendant filed a second appeal and obtained a stay of the operation of that judgment. The decision of the second appeal was given in April 1968. This period of 7 years has therefore to be excluded by computing the period of limitation under Section 15 of the Limitation Act. Thus the original period of limitation under article 120 of the Limitation Act read with section 30 of the Current Limitation Act and Article 113 of the said Act the period of limitation for the filing of the suit would be till April 1966. As given above the operation of the judgment passed by the learned Civil Judge was stayed till 24.06.1968. The date of the institution of the appeal in the High Court is not move by any documents on record. The appeal is however No. 439 of 1961 and was referred against the judgment dated 28.10.1960. It can therefore, reasonably presumed that it was filed in the earlier part of 1961. There is nothing to show that there extension of time was sought in instituting the appeal. Even if it was filed in April 1961, six months after the judgment of the learned Civil Judge, the plaintiffs would get benefit of 7 years period to be excluded from the period of limitation under Section 15 of the Limitation Act. This suit was instituted in October 1972 and is therefore well within limitation even if the appellants arguments are totally accepted. Even if the appeal was filed in the end of 1961, the suit filed on 12.10.1972 could be within time.

32. For the reasons stated above I do not find any merit in the second appeal. I am of the view that, this second appeal is concluded by concurrent finding of facts, I, therefore, do not find any ground to interfere in the impugned judgments and orders passed by the courts below. Both the courts below

have recorded concurrent finding of fact, which cannot be interfered at the stage of second appeal.

33. Accordingly, the second appeal is dismissed.

(B.C. Kandpal, J.)

11.12.2006
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